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No. 87-65

In The
# Supreme Court of the United States
October Term, 1987

UNITED STATES OF AMERICA,

*Petitioner,*

v.

PROVIDENCE JOURNAL COMPANY and
CHARLES M. HAUSER,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## PETITIONER'S OBJECTION TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## PETITIONER'S OBJECTION TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

Petitioner respectfully objects to respondents' motion for an order dismissing the writ of certiorari.

## REASONS FOR OBJECTION

This case is about a direct, deliberate affront to the district court and respondents' arrogation to themselves of judicial power to determine the rights of a suitor. As this Court has recently stated, " 'there could be no more

important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience.'" *Young v. United States ex rel. Vuitton et Fils S.A.*, — U.S. —, 107 S.Ct. 2124, 2131 (1987), citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911). The special prosecutor is pursuing that duty in this case.[1] Unless permitted to do so, the district court will be left without "an independent means of self-protection" and its orders for the protection of citizens' rights would become merely advisory. *Young*, 107 S.Ct. at 2132.

The special prosecutor is not required to obtain leave of the Attorney General to pursue review by this Court.[2] *See Young*, 107 S.Ct. at 2130, 2131-32, 2133, 2134, 2136. Indeed, the Solicitor General does not believe that 28 U.S.C. § 518(a) applies to this case. (S.G. Br. 2-3 n.2). That is, the Solicitor General and Department of Justice attorneys have concluded that in light of *Young*, they "do not believe that authorization of the Solicitor General is required in order for the specially appointed private attorney to seek review in this Court on the district court's behalf." (S.G. Br. 3 n.2).

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[1]As explained in the "list of parties" section of the petition for certiorari, the caption of the case below was *In The Matter of Application to Adjudge The Providence Journal Company and its Executive Editor, Charles M. Hauser, In Criminal Contempt*. The caption was changed from an "In The Matter of" style only to conform to what petitioner's counsel understands to be the Court's preference for a caption indicative of the adversary nature of the proceeding. R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, § 6.18(d) (6th ed. 1986).

[2]It is true that the Solicitor General declined to authorize the special prosecutor to appear before this Court in this case or file a petition for writ of certiorari.



*Young* held, among other things, that courts have inherent power to initiate criminal contempt prosecutions for disobedience to their orders independent of having to rely upon another branch of government to do so. 107 S.Ct. at 2130, 2131-32. Courts therefore should not have to rely upon the Executive Branch to determine whether or how such prosecutions should proceed. 107 S.Ct. at 2131, 2132, 2134. If, in a criminal case, the prosecuting party, the "United States," is a party which can only be composed of all three branches, then this holding in *Young* presumably would not have been reached. In recognizing this independent, inherent power of the Judicial Branch, the Court gives added validity to the concept of separation of governmental powers.

*Young* went on to explain that a court should ordinarily first request the appropriate prosecuting attorney to prosecute criminal contempt actions; a private attorney should be appointed only if that request is denied. 107 S.Ct. at 2134. The appointment of the private attorney here was before *Young* was handed down.[3] The order appointing the special prosecutor indicates that it was made

> In accord with the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure, since the United States Attorney for the District of Rhode Island represents parties who are Defendants in this action...

(J.A. 237).

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[3]The order appointing the special prosecutor vested him "with *full* authority to prosecute the pending Motion for Contempt of this Court's Order of November 13, 1985." (J.A. 237-38) (emphasis added).

The parties to the underlying litigation which were represented by the United States Attorney were, along with the media defendants, under the restrictions of the November 13, 1985 temporary restraining order. (J.A. 221). In addition, and quite significantly, the United States Attorney at the November 13, 1985 chambers conference and thereafter defended his clients by taking the position that the court lacked subject matter jurisdiction. (J.A. 172, 227, 229, 230, 231, 232). That argument has never been accepted nor could it be; clearly, the court had jurisdiction to resolve the constitutional claims brought before it. *Bell v. Hood*, 327 U.S. 678, 684 (1946). Where the United States Attorney had adopted a "no jurisdiction" position as his defense of his various clients, he created an irresolvable conflict which would bar his objective handling of the criminal contempt matter.

28 U.S.C. § 518(a) concerns participation in this Court by the Attorney General and the Solicitor General in cases "in which the United States is interested." Since the special prosecutor was appointed by the district court under Fed. R. Crim. P. 42(b), rather than by the Executive Branch's attorney under 28 U.S.C. § 543 or otherwise, the "interest" of the United States in this case would be limited to the district court and the public's interest in and need for the prosecuton. *Young*, 107 S.Ct. at 2136.

The proposition that the Attorney General's authorization is necessary before a special, private and independent prosecutor can appear before this Court cannot be squared with the holdings in *Young*. In *Young* the district court entered a criminal contempt conviction. After that judgment was affirmed by the Court of Appeals for the



Second Circuit, defendants petitioned for a writ of certiorari. That petition, of course, was granted. At some point, as it happened, Executive Branch permission was given to the special prosecutors in *Young* to appear before this Court. (Respondents' motion to dismiss 8 n.7). The question here is whether special prosecutors now, i.e., since *Young*, can only appear here at the allowance of the Executive Branch's attorney. We submit that notwithstanding 28 U.S.C. § 518(a), specially appointed attorneys in any other case which reaches this Court need not obtain the Attorney General's leave to appear. For, if authorization be denied by the Executive Branch, and, as here, the Attorney General opts not to take over prosecution, the judgment in vindication of the court's authority will be left with no one to speak for it.

That is, the affronted court would be left without power to protect itself from violations of its decrees. Again, *Young* holds that courts have inherent power to protect themselves exclusive of reliance upon other branches of government. 107 S.Ct. at 2131, 2133, 2134. Therefore, the proposition that the Attorney General's authorization is needed for a special prosecutor to appear in this Court—or in any other court for that matter—cannot stand.

If 28 U.S.C. § 518(a) is considered in an absolute sense, even this Court would be powerless to appoint a prosecuting attorney where the Attorney General declines to grant the prosecutor authority to appear here. *But see, e.g., Merrimack River Savings Bank v. City of Clay Center*, 219 U.S. 527, 535-36 (1911); *United States v. Shipp*, 203 U.S. 563, 572 (1906) (the Supreme Court has power, like lower courts, to punish contempts of its authority).

Such a result and the vesting of such exclusive power in the Executive Branch should not be permitted. *See Bob Jones University v. United States,* 456 U.S. 922, 459 U.S. 812 (1982), 461 U.S. 574, 585 n.9 (1983); (the Court appointed an attorney to brief and argue in support of the judgments below when the United States refused to defend its position taken in the lower courts that a private university which practiced racial discrimination did not qualify for tax exemption under the Internal Revenue Service Code); *see also* 51 U.S.L.W. 3295, 3296 (U.S. May 24, 1983) (No. 81-3) (summarizing argument in *Bob Jones University*); R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice,* § 13.13, 574, § 14.2, 581 (6th ed. 1986).

In *United States v. McKenzie,* 735 F.2d 907 (5th Cir. 1984), the district court dismissed criminal contempt charges instituted by its special, private prosecutor. The private prosecutors for that reason were no longer necessary to protect and vindicate the district court's power and, therefore, were no longer authorized to do so. Here, however, a conviction was entered by the district court. The special prosecutor here, with the district court and the public's interest in mind, had good reason to believe that the court of appeals incorrectly reversed the conviction. Hence, the petition for certiorari was filed.

Respondents argue that 28 U.S.C. § 518(a) reflects a clear intention for the United States to speak with one voice. (Respondents' Motion to Dismiss 5, 6-7). *But see Bob Jones University v. United States, supra.* Ironically, in *Young* the Solicitor General took an opposing position to the private, interested special prosecutor. Here, the Solicitor General and the special prosecutor, who is



disinterested, have filed consistent briefs.[4] The special prosecutor's actions and arguments therefore essentially have been ratified by the Solicitor General.

Respondents cite *Diamond v. Charles,* 476 U.S. 54, 106 S.Ct. 1697 (1986), and *Karcher v. May,* — U.S. —, 56 U.S.L.W. 4022 (U.S. Dec. 1, 1987) (No. 85-1551). Those cases were dismissed because the parties had no standing to appeal. Petitioner here, the United States of America, certainly has standing as the Court may grant certiorari to any party in a criminal case. 28 U.S.C. § 1254(1); *see United States v. Gulf Refining Co.,* 268 U.S. 542, 544-45 (1925). Respondents' motion does not address the standing of petitioner but rather seems to raise the question of whether its attorneys are properly before the Court. Petitioner's attorneys' participation here would seem to have been confirmed by the Court's recent holding that the judiciary ought not be dependent upon other branches for protection of direct affronts. *Young,* 107 S.Ct. at 2131, 2133, 2134.

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[4]Respondents argue that the briefs of the special prosecutor and the Solicitor General are inconsistent. (Respondents' Motion to Dismiss 11). As an example, respondents seem to state that the Solicitor General recognizes that a court must have jurisdiction before it can punish a party for violation of an order but that the special prosecutor does not fully agree with that principle. This is simply inaccurate. The special prosecutor has always taken the position that jurisdiction is required before one can be held in contempt for violation of an order. (Pet. App. 7; Pet. Br. 16, 17, 28 n. 13, 29, 32).

## CONCLUSION

The motion to dismiss the writ of certiorari should be denied.

Respectfully submitted,

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